

No. 10,339.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HUGO VON SEGERLUND, ALICE VON SEGERLUND, FLORENCE KEE BROWN, JOHN A. FREAR, JOHN S. CROSS, VALERIA C. PAINTER, WILLIAM PIETSCH, D. F. HANLEY, BERTHA NELSON, ALMA C. SWENSON, FREDERICK R. COOK, JOSEPHINE KAISER, BEATRICE RUMMELLE, JOHN J. McFARLANE, ADA S. MACKEY, JAMES P. MACKEY, JR., AMY SIMPSON, ADELAIDE G. STURGIS, MARGARET BELL FITZPATRICK, MABEL P. TRAVIS, ELIZA J. FULTON, MARGARET MINNICK, NELLIE NELSON LEE, IDA SWENSON, BERTHA KENNISTON, S. H. KENNISTON, CAROLINE A. WILDE, MRS. AUGUST DRESCH, HENRY A. KULHA, LEONIA E. KULHA, ALBERT G. LOELIKE, REINHOLDT A. WOLTER, ADELINE B. WOLTER, SILAS WHITCOMB, W. H. BORTON, HENRIETTA BERNITT, VIRGINIA MAGALE COSHOTT, JOSIE C. IDE, by W. H. BORTON, her attorney in fact, and AMBROSIA INVESTORS COMPANY, INC., a corporation,

Appellants,

vs.

STELLA DYSART, individually, and STELLA DYSART, also doing business as the Ambrosia Club and the Mutual Land Owners, Limited,

Appellee.

APPELLEE'S REPLY BRIEF.

HIRAM E. CASEY,
S. BERNARD WAGER,
535 Rowan Building, Los Angeles,
Attorneys for Appellee Stella Dysart

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APPELLEE'S REPLY BRIEF.

Statement of Facts.

To the statement of the case as set forth by the appellants beginning at page 2 of their opening brief should be added that the judgment referred to by them in the case of *Mary T. Christensen, plaintiff, v. Stella Dysart, et al., defendants*, in the District Court of the state of New Mexico, First Judicial District in and for the county of

McKinley, and numbered 5134, was procured in the February Term in 1937, and was docketed in the office of the county clerk in McKinley county, New Mexico, on March 22, 1937 [Tr. p. 210]; that at that time the respondent herein had real property in McKinley county, New Mexico, upon which this judgment then became a lien [Tr. pp. 205-206]; that under the laws of New Mexico, as they then existed, the judgment docketed in the office of the county clerk became a lien upon the real property of the judgment debtor in the county [Tr. pp. 204-205]; that petitioning creditors' Exhibit 2 the judgment record in the Youngblood action was received in evidence for limited purposes as therein set forth [Tr. pp. 210-211-221]; that the Christensen judgment herein referred to is the same judgment that was alleged to have created an act of bankruptcy in the previous bankruptcy petition filed against this respondent, and which matter was heretofore passed upon by this Circuit Court in the matter of Dysart vs. Von Segerlund, *et al.*, numbered 9576, and reported in Volume 118, Federal (2d), page 482, and decided March 22, 1941.

That an execution on personal property was issued and levied on the Christensen judgment on September 8, 1937 [Tr. p. 85], and then again on November 31, 1939. [Tr. p. 87.]

Question Involved.

The question involved might be restated as being whether, where a judgment had become a valid existing lien upon real property of the judgment debtor, and had so remained for more than four months, and then thereafter, the judgment creditor caused an execution on said judgment to be levied upon other property of the judgment debtor, the said lien so created by the levy on the other property by the subsequent execution and more than four months subsequent to the creation of the original lien on the real property of the judgment debtor, could be an act of bankruptcy, assuming the other necessary elements thereof are present. In short, whether, if a lien is obtained by judgment before the determining period has commenced to run, and enforcement proceedings are instituted within the four months' term, a complete act of bankruptcy has been committed.

ARGUMENT.

POINT I.

The Trial Court Properly Refused to Accept as Evidence, for the Purpose of Establishing an Act of Bankruptcy, the Record in the Christensen Case Showing the Levy of the Execution and Sale Within Four Months of Personal Property Thereof.

Section 3 (a), Sub. 3 of the Bankruptcy Act provides:

“Acts of bankruptcy by a person shall consist of his having suffered or permitted, while insolvent, any creditor to *obtain a lien* upon *any* of his property through legal proceedings, and not having vacated or discharged such lien within thirty days from the date thereof, or at least five days before the date set for any sale or other disposition of such property.” (Emphasis by italics supplied.)

It will be noted that the judgment in the *Christensen* case became a lien upon the property of the Stella Dysart in March, 1937. The petitions to have the Stella Dysart adjudicated a bankrupt herein were filed July 5, 1941 [Tr. p. 10], July 29, 1941 [Tr. p. 37], and October 17, 1941 [Tr. p. 54], and consequently each of the said petitions herein was filed more than four months subsequent to the procurement of the lien of the Christensen judgment in March, 1937. In other words, Mary Christensen, by her judgment docketed in March, 1937, procured a lien upon property of Stella Dysart before the determining period herein. After having issued two executions [Tr. pp. 85 and 87], she again issued an execution and caused it to be levied and a sale of property under it on July 7, 1941, under an execution issued May 7, 1941. The first two executions herein referred to were, as was the lien,

created by the judgment when docketed in March, 1937, created and levied before the determining period herein involved had commenced to run.

The petitioning creditors herein now assert their claim that a new act of bankruptcy was created by the issuance and levy by an alias writ of execution [p. 89] on the balance of the Christensen judgment, and the execution by the sheriff showing the levy of the said writ. This execution was issued May 5, 1941 [Tr. pp. 89-90], and the sale was had July 7, 1941, more than four years after Christensen obtained a lien on property of Stella Dysart, and thus nearly four years beyond the period which the Bankruptcy Act states creates an act of bankruptcy.

The objection to the petitioning creditors offer of the record in the Christensen judgment raised the question immediately as to whether, where, as here, a judgment creditor had a lien by her judgment on real property of the judgment debtor, the enforcement of which would have enabled her to collect a greater percentage of her claim than other creditors of the same class, could after the passing of four months from the procurement of her lien on real property, thereafter levy an execution issued out of the said judgment upon personal property, and the lien thus procured by the levy upon personal property be used as an act of bankruptcy. This was the point directly presented to the Court [Tr. p. 174], which was argued at length, and the Court carefully went through the authorities presented to determine what its ruling should be. [Tr. pp. 170-203.] Notwithstanding the existence of this situation the appellants have failed to cite in their opening brief a single authority to substantiate the position assumed by them at the trial of the case, nor have they cited a single case in their brief that holds contrary to the

decision of the Court below, to the effect that if at any time a lien was actually obtained by the judgment against any of the property of the debtor, that that exhausts the power of this action and that thereafter the running of the four-month period cannot be started by levying another execution out of the same judgment upon other property of the debtor which may make its appearance after the judgment.

Appellants cite and quote from the case of *Citizens Banking Co. v. Ravenna Bank*, 234 U. S. 360 (App. Op. Br. p. 12). In the excerpt so quoted we are not given any aid on the point involved, nor do we see how it is of any benefit to the position taken by the petitioners. However, this decision is cited by the Court in the case of *Hawthorne Valley, Inc. v. Arthur J. Adams*, 69 Fed. (2d) 691, wherein it is stated:

“The court has no jurisdiction to entertain an involuntary petition against an insolvent bankrupt unless it has committed an act of bankruptcy within four months before the petition is filed. Bankruptcy Act, Section 3b, 11 U. S. C. A., Section 21(b).”

But section 3b does not define “an act of bankruptcy.” We must look elsewhere for the definition of the third act of bankruptcy. It is found in *Citizens’ Banking Co. v. Ravenna Nat’l Bank*, 234 U. S. 360, 32 Am. B. R. 477, 34 S. Ct. 806, 58 L. Ed. 1352, where the Court said:

“Looking at the terms of this provision, it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execu-

tion, or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision. All this is freely conceded by counsel for the petitioning creditor."

See, also, the analysis of this provision in *Northwestern Pulp & Paper Co. v. Finish Luth. Book Concern* (C. C. A., 9th Cir.), 18 Am. B. R. (N. S.) 541, 51 F. (2d) 340; and *In re Fisher* (D. C., Pa.), 33 Am. B. R. 628, 219 F. 638.

According to the petition the preference consisted of the levy of the *feri facias* on March 2, 1932. (Mich. Comp. Laws 1929, Section 14541.) But this levy, of March 2, was made more than four months before the petition was filed and we think therefore that there was a failure to aver an act of bankruptcy because the preference which was a constituent element of the act was not "suffered or permitted" within that period.

Northwestern Pulp & Paper Co. v. Finish Luth. Book Concern, supra;

Owen v. Brown (C. C. A., 8th Cir.), 9 Am. B. R. 717, 120 F. 812;

In re Deer Creek Water & Water Power Co. (D. C., Pa.), 29 Am. B. R. 356, 205 F. 205;

In re McGraw (D. C., W. Va.), 43 Am. B. R. 38, 254 F. 442;

Remington on Bankruptcy (3d Ed.), Vol. 1, Sec. 150.

See, also:

In re Superior Jewelry Co. (C. C. A., 2d Cir.), 39 Am. B. R. 575, 243 F. 368;

Colston v. Austin Run Mining Co. (C. C. A., 3d Cir.), 28 Am. B. R. 92, 194 F. 929;

In re D. F. Herlehy Co. (D. C., N. Y.), 41 Am. B. R. 171, 247 F. 369.

It is true that the three cases last cited deal with another element of the combination, *i. e.*, the failure to vacate or discharge the preference at least five days before the sale of the property but they do not differ in principle from the *Northwestern* case, the *Owen* case, and the *Deer Park* case.

We think this interpretation of section 3(a) (3), 11 U. S. C. A., section 21(a) (3) is correct, because, while clause 3 does not in specific terms require that the preference, which the debtor may discharge at least five days before a sale or other disposition of the property affected, shall be obtained within four months before the petition is filed, yet a contrary holding would lead to a situation which we think was never contemplated. (*Owen v. Brown, supra.*) The security of all preferences obtained through legal proceedings at any time however long before the four months' period would be endangered and such a result would be inconsistent with section 67f, 11 U. S. C.

A., Sec. 107(f), as construed in *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 23 S. Ct. 67, 47 L. Ed. 122. For, in that case, the Court said:

“In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. * * * If this were not so the date of the acquisition of a lien by attachment or creditor’s bill would be entirely immaterial.” (*Italics ours.*)

To the same effect is the case of *In re Getz*, 25 Fed. (2d) 773, at page 774, wherein the Court said:

“The petition avers in substance that the alleged bankrupt, while insolvent and within four months next preceding the filing of the petition, permitted a judgment to be entered against him, which judgment has not been vacated, discharged, or satisfied, and that more than 30 days have elapsed since the entry of the judgment. It is contended that this is not sufficient, because there is no allegation that the judgment is a lien on any property of the bankrupt. The point for decision is whether the word ‘judgment’ in the statute means only a judgment which is a lien upon the property of the alleged bankrupt, or means and judgment, whether a lien or not.

The statute specifies ‘any levy, attachment, judgment, or other lien.’ 11 U. S. C. A., Section 21(a) (4). Many judgments (as in a case where the defendant owns no real estate, but personal property

only) are not liens. There is thus an ambiguity, and it is proper to consider the history and purpose of the legislation in order to determine its true intent. In *Citizens' Banking Co. v. Ravenna National Bank*, 234 U. S. 360, 32 Am. B. R. 477, 34 S. Ct. 806, 58 L. Ed. 1352, the Supreme Court held that the clause providing for the third act of bankruptcy (11 U. S. C. A., Section 21(a) (3)) failed to cover a situation where the bankrupt had permitted a lien to be obtained against his property by legal proceedings, and had then done nothing for a period of more than four months, as a result of which the lien of the judgment had ripened into a legal and enforceable preference.

The amendment of 1926 was designed for the specific and limited purpose of remedying this defect in the existing law. The report of the Senate Judiciary Committee upon the bill says: 'The amendment is for the purpose of preventing a creditor from obtaining a lien and holding it without proceeding to a sale under it until it ripened into a preference.' Clearly, the attention of the Congress was turned only to judgments which were liens. Legislation directed toward judgments which were not liens would have been superfluous. Under the law as it stood before the amendment, no advantage could have been obtained prior to levy by the creditor holding such a judgment, and after levy and upon proceeding to a sale the provision for the third act of bankruptcy struck down the preference.

The context in which the word appears, and the limitations implied in the phrase 'or other liens,' call for the application of the rule of *noscitur a sociis*. *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586. The plain intent of the Congress, as well as the association of the word in the act itself, 'justifies, if it does

not imperatively require,' the conclusion that the judgment meant is a judgment which creates a lien.

If the judgment referred to in the petition is a lien, and so within the meaning of the statute thus construed, the petitioners should be permitted to so aver. Ten days will be allowed for amendment, and in default of such amendment the petition will be dismissed."

This Circuit Court had occasion to refer to the interpretation of section 3, subdivision A of the Bankruptcy Act involved in the present action, when the former involuntary proceedings against Stella Dysart were before this Court. In the case of *Stella Dysart v. Hugo Von Segerlund*, 118 Fed. (2d) 482, this Court stated:

"There is no evidence that appellant, within four months next preceding the filing of the original petition, the supplemental petition or the amended petition, committed any of the acts which section 3, sub. (2), declares to be acts of bankruptcy. There is evidence that appellant suffered or permitted a creditor, Mary T. Christensen, to obtain a judgment against her in 1937, and that she suffered or permitted another creditor, E. H. Youngblood, to obtain a judgment against her in 1938; and we assume, without deciding that Christensen and Youngblood thereby obtained liens upon appellant's property; but there is no evidence that appellant was insolvent when said liens, if any, were obtained. Furthermore, said liens were obtained, if at all, long prior to the commencement of the four months' period specified in section 3, sub. (b)."

Incidentally, in this case the Court mentioned the fact that the judgments were obtained in New Mexico and

the absence of any showing as to whether or not the judgment obtained in New Mexico becomes a lien upon judgment debtor's property. In the present case this question is answered in the affirmative by stipulation of counsel and by reference to the New Mexico Statutes, Chapter 76, section 110.

The question involved here appears to have been squarely met by this Court in the case of *Northwestern Pulp & Paper Co. v. Finish Lutheran Book Concern*, 51 Fed. (2d) 340. In this case the Court held that an act of bankruptcy is not committed by an insolvent debtor's failure to vacate a judgment that gives rise to a lien at a date prior to the commencement of the four-month period, within at least five days before the date of sale or other disposition of the property of the debtor, said sale taking place within the four-month period. Among other things the Court stated:

"The controlling question presented in this case is whether or not an act of bankruptcy is committed by an insolvent debtor's failure to vacate a judgment that gave rise to a lien at a date prior to the commencement of the four-month period, within at least five days before the date of sale or other disposition of property affected by the judgment, said sale taking place within the four-month period.

If we apply to this definite problem certain fundamental principles of law, as set forth in the statute itself and expounded by numerous courts, we shall find that many of the apparent difficulties of the case will disappear." . . . "The act of bankruptcy, then, if any was committed in this case, was a violation of clause (3) or clause (4) of section 3(a), 11 U. S. C. A., section 21(a), (3), (4).

A scrutiny of each of these two clauses reveals that the act of bankruptcy therein defined consists of two elements, each of which must be present to bring the debtor within the purview of the statute: (1) The debtor must, while insolvent, suffer or permit a preference to be obtained; (2) he must fail to discharge such preference within a stated time.

The use of the conjunction 'and' instead of the disjunctive particle 'or' indicates that both elements must concur to constitute an act of bankruptcy. *In re Vetterman* (D. C., N. H.,) 14 Am. B. R. 245, 135 F. 443. And both must occur within the four-month period prior to the filing of the petition in bankruptcy. If the lien is obtained before the determining period has commenced to run, and enforcement proceedings are instituted within the four months' term, a complete act of bankruptcy has not been committed.

That both judgments in this case created valid liens at the time the judgments were docketed is admitted by the appellee in its amended petition. Provision for the obtaining of such liens is contained in the Oregon statute, *supra*.

It next becomes necessary to inquire whether merely permitting, while the debtor is insolvent, a judgment creditor to enforce, within the four-month period preceding the filing of the petition, a valid lien docketed many months in the past, constitutes an act of bankruptcy.

The general principle is thus laid down in Remington on Bankruptcy, sec. 150, vol. 1, p. 199 (3d Ed.): 'The mere enforcement, within the four months period, of a lien obtained before the four months period, is valid and unaffected.'

The leading case on this subject is that of *Metcalf v. Barker*, 187 U. S. 165, 9 Am. B. R. 36, 23 S. Ct. 67, 47 L. Ed. 122, in which Mr. Chief Justice Fuller enunciated the following doctrine: ‘* * * Where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized.’

See, also, *Thompson v. Fairbanks*, 196 U. S. 516, 13 Am. B. R. 437, 25 S. Ct. 306, 49 L. Ed. 577.

The doctrine laid down in *Metcalf v. Barker* has been recognized or approved in later decisions of the United States Supreme Court. In *Glove Bank, etc., v. Martin*, 236 U. S. 288, 34 Am. B. R. 162, 35 S. Ct. 377, 59 L. Ed. 583, Mr. Justice Day said: ‘The difference, having the provisions of the act in view, between the beginning of a proceeding to assert liens that existed more than four months before the filing of the petition in bankruptcy, and the attempt to create them by attachment and other proceedings within four months, has been recognized in decisions of this court. In *Metcalf v. Barker*, * * * a proceeding to give effect to a prior lien existing more than four months before the filing of the bankruptcy petition was held not within the meaning of Section 67(f) of the Bankruptcy Act (11 U. S. C. A., sec. 107, subd. f.)’

See, also, *Taubel, etc. Co. v. Fox*, 264 U. S. 426, 2 Am. B. R. (N. S.) 912, 44 S. Ct. 396, 68 L. Ed. 770.

District and Circuit Courts have followed this principle for the past two decades. In *Colston v. Austin Run Mining Company* (C. C. A., 3d Cir.), 28 Am. B. R. 92, 194 F. 929, the court said, with refer-

ence to a foreign attachment lien created before the commencement of the four-month period:

* * * both reason and the weight of authority compel the conclusion that mere failure, while insolvent, to vacate or discharge the lien within the statutory period of four months, and at least five days before a sale or final disposition of the property affected, does not constitute an act of bankruptcy. Priority is obtained when a lien attaches, and not when it is enforced. The date of the sale is immaterial in this respect: whenever it takes place, it relates back to the date when the lien attached.'

In re Deer Creek Water & Water Power Co. (D. C., Pa.), 29 Am. B. R. 356, 205 F. 205, we find the following language:

'It is not sufficient to charge acts of bankruptcy in the language of the statute. (Citing cases.) And the facts appearing from the petition showing sufferance of the enforcement by execution of a lien antedating four months the filing of the petition do not constitute or amount to such.'

See, also, *Yumet & Co. v. Delgado* (C. C. A., 1st Cir.), 40 Am. B. R. 293, 243 F. 519, citing *Metcalf v. Barker*; *In re Brinn* (D. C., Ga.), 45 Am. B. R. 74, 262 F. 527; *In re Herlehy Co.* (D. C., N. Y.), 41 Am. B. R. 171, 247 F. 369.

In the case of *In re McGraw* (D. C., W. Va.), 43 Am. B. R. 38, 254 F. 442, the situation is thus aptly summarized:

'The rendering of a judgment, therefore, can only constitute an act of bankruptcy when (a) the debtor is insolvent, (b) has within 4 months of the filing of the bankruptcy petition suffered and permitted it to be obtained, (c) upon which execution has issued, (d) been levied upon his property, (e) such property ad-

vertised for sale, and (f) he has failed, at least five days before the date fixed for sale, to discharge or vacate the same; and all these prerequisites must occur within four months of the filing of the petition.' (*Italics our own.*)

So, also, in *Gatell v. Millian* (C. C. A., 1st Cir.), 5 Am. B. R. (N. S.) 340, 2 F. (2d) 365, decided in 1924, *per curiam*:

'The attachment made more than four months prior to the filing of the petition in bankruptcy created a valid lien. * * * The judgment, execution, and sale of the attached land within the four months and prior to the filing of the petition in bankruptcy were in enforcement of the lien acquired prior to the four months period, and were valid notwithstanding the subsequent adjudication.'

See, also, *In re Berlowe* (D. C., N. J.), 5 Am. B. R. (N. S.) 937, 7 F. (2d) 898, decided in 1925, and *Cohn & Co. v. Drennan* (D. C., La.), 10 Am. B. R. (N. S.), 287, 19 F. (2d) 642, decided in 1927, in which latter case the following language was used:

'When such a lien, created by an attachment, has been subsistent beyond four months, the property or money seized by garnishment or other mesne process is not discharged therefrom simply because the judgment necessary for its recognition and enforcement comes of a date within four months of a date when less diligent creditors elect to file bankruptcy proceedings.

'If an inchoate lien such as an attachment is given such validity if obtained prior to the four-month period, a fortiori a judgment lien, representing a complete right, should be accorded at least as much weight.' . . . 'Some confusion has arisen as to the interpretation of the case of *Citizens' Banking*

Company v. Ravenna National Bank, 234 U. S. 360, 32 Am. B. R. 477, 34 S. Ct. 806, 58 L. Ed. 1352. This case, which is relied upon heavily by the appellant, supports the latter's contention only indirectly. In fact, it is likewise cited by the court below to sustain a contrary view.'

The difficulty probably arises from the fact that the Ravenna case did not involve the same facts as does the instant suit. There the act charged was that the alleged bankruptcy, within four months next preceding the filing of the petition, and while insolvent, (a) suffered and permitted the Citizens' Banking Company to recover a judgment against her, and to have an execution issued and levied thereunder, whereby the company obtained a preference over her other creditors, and (b) at the time of the filing of the petition, which was one day less than four months after the levy of the execution, she had not vacated or discharged the levy and resulting preference. No reference was made to a date of sale, within five days before which date she would have been obliged to vacate the levy if she wished to avoid an act of bankruptcy.

It will be noted that in the Ravenna case, all the acts complained of were committed within the four-month period. The Supreme Court held that mere inaction by an insolvent debtor for four months after the levy of an execution upon his real estate did not constitute an act of bankruptcy. The interpretation of the Ravenna case has already been given by this court. *Larkin-Green Logging Co. v. Sabin* (C. C. A., 9th Cir.), 35 Am. B. R. 86, 222 F. 814.

In the instant case, on the other hand, there were dates of sale under both judgments, from which dates the five-day period for discharging the preferences

might have been computed. Both judgments, however, were created into liens on the debtor's property before the commencement of the four-month period, and were therefore unquestionably valid.

But even in the Ravanna case, which, as we have said, did not present facts parallel with those at bar, the Supreme Court did use, on pages 364 and 365 of 234 U. S., 34 S. Ct. 806, 808, language that sustains the general principle by which we are being guided here:

‘Looking at the terms of this provision (Section 3a(3) of the Bankruptcy Act), it is manifest that the act of bankruptcy which it defines consists of three elements. The first is the insolvency of the debtor; the second is suffering or permitting a creditor to obtain a preference through legal proceedings; that is, to acquire a lien upon property of the debtor by means of a judgment, attachment, execution, or kindred proceeding, the enforcement of which will enable the creditor to collect a greater percentage of his claim than other creditors of the same class; and the third is the failure of the debtor to vacate or discharge the lien and resulting preference five days before a sale or final disposition of any property affected. Only through the combination of the three elements is the act of bankruptcy committed. Insolvency alone does not suffice, nor is it enough that it be coupled with suffering or permitting a creditor to obtain a preference by legal proceedings. The third element must also be present, else there is no act of bankruptcy within the meaning of this provision.’

Conversely, it may logically be argued that the first and third elements alone (namely, insolvency and failure to vacate the preference) do not suffice to

constitute an act of bankruptcy, even though both have occurred within the four-month period. If the alleged preference (*i. e.*, the docketing of the judgment) was obtained more than four months prior to the filing of the petition, this fact deprives the alleged act of bankruptcy, all of which must be committed within the four-month period, of one-third of its essence. Under such circumstances, there is no act of bankruptcy at all.

Counsel for the appellee contend that if the adjudication is set aside certain creditors of the alleged bankrupt will thereby be able to secure title to property to the exclusion of the other creditors, and that thus the estate will be dissipated. This is unfortunate, of course, but it must be remembered that the two judgments referred to were obtained during the year 1929, long prior to the time the creditors herein filed their original petition; and that they did nothing to protect their interests, and were neither diligent nor timely in asserting their rights, notwithstanding the fact that the proceedings, including the filing of the suits, the recording of the judgments, the levies and the sales, were all matters of public record."

From a reading of the foregoing case and in fact from the reading of the Bankruptcy Act itself, it appears well established that the Act deals with liens obtained upon any property of the debtor through legal proceedings, and that once this has occurred in an action wherein the judgment has become a lien, and has permitted the four-month period therefrom to have expired, then the right to have the procurement of a lien upon such judgment as an act of bankruptcy has been exhausted. This being true, the Court did not err in sustaining the objection to the petitioner's offer.

POINT II.

The Trial Court Did Not Err nor Commit Reversible Error in Admitting Petitioning Creditors' Offer to Receive in Evidence for Limited Purposes the Exemplified Record of Youngblood v. Dysart.

The Court did not, as appellants state in their opening brief on page 13, refuse the offer of exhibit, but on the contrary admitted it for limited purposes [Tr. p. 210]. wherein the Court said: "Let us withhold ruling on that at the present time. You have the stipulation and I will overrule the objection to the document which you identify," and on page 211 the Court further stated: "All right I receive that only as material so far as it shows as a fact that real property existed at the time of the judgment to which the lien would attach." In addition to this point counsel for the appellant stated to the Court below in reference to the Youngblood offer:

"Mr. Turnbull: —showed existence of real property in New Mexico in the name of Stella Dysart showing a mechanic's lien thereon and a sale, execution sale, an order approving the sale as made by the District Judge, I offer that in evidence for the purpose of showing that there was real estate.

Mr. Casey: The only objection I have there is that in one of these petitions this is cited as an act of bankruptcy. If this is introduced it might possibly be used to substantiate that. I am objecting to that alleged act of bankruptcy. 1st. It is not a lien procured by legal proceedings, as a mechanic's lien.

Mr. Turnbull: I agree it does not constitute an act of bankruptcy, and it is not offered for that purpose. The petitioning creditors at this time will not rely upon the Youngblood proceedings."

Under these circumstances we respectfully state that the Court made no error in this ruling on the offer of the Youngblood record.

POINT III.

The Trial Court Did Not Commit Reversible Error in Denying to Petitioning Creditors the Right to Prove Insolvency and the Right to Prove Their Status as Creditors and to Prove the Nature, Amount and Extent of the Indebtedness of Stella Dysart, and in Dismissing the Bankruptcy Proceedings.

The ruling of the Court in denying the offer of proof made by the petitioning creditors relative to the insolvency of Stella Dysart, and the claims of the petitioning and intervening creditors, was made at the instance of the parties to these proceedings, and in order to obviate what would otherwise have been a useless presentation to the Court of some fifty-two petitioning and intervening creditors. In view of the ruling of the Court as to a controlling feature of the case, to-wit, the existence of an act of bankruptcy and its ruling that there was no act of bankruptcy presented by the petitioners, certainly there could be no error in the Court acquiescing in the procedure proposed by both the appellants and the appellee. And we respectfully submit that in addition to the form of the offer of proof as made by the appellants, if it had been properly presented and accepted by the Court, could not have changed the outcome of this action.

Wherefore, the appellee herein respectfully submits that the judgment of the Court herein below should be affirmed, and that the rulings of the Court complained of by the appellants were not erroneous, and that the order dismissing the proceedings herein should be affirmed.

Respectfully submitted,

HIRAM E. CASEY,

S. BERNARD WAGER,

Attorneys for Appellee Stella Dysart.